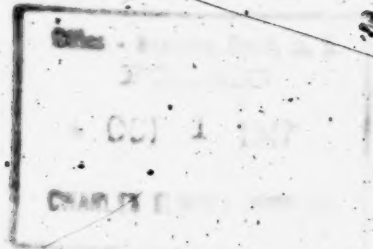


R. Hodge



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 379

6

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION,

Petitioner,

vs.

GRAND-HYDRO, A PRIVATE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA
AND BRIEF IN SUPPORT THEREOF.

QUINCE B. BOYDSTUN,
DELMAS E. MARTIN,
ROBERT LEANDER DAVIDSON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 379

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION,

vs.

Petitioner,

GRAND-HYDRO, A PRIVATE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE SUPREME COURT OF THE STATE OF OKLAHOMA TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVIEW AND DETERMINATION THE CASE OF GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, PLAINTIFF IN ERROR, v. GRAND-HYDRO, A PRIVATE CORPORATION, DEFENDANT IN ERROR, No. 32,399, ON THE DOCKET OF THE STATE SUPREME COURT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

This is a condemnation proceeding instituted by petitioner on February 17, 1939, in the District Court of Mayes

County, Oklahoma, to acquire from the respondent the fee simple title to 1462.48 acres of land for use in connection with the construction, maintenance and operation of a flood control and hydroelectric project on Grand River in Oklahoma, known as the Pensacola Project—362 acres for use as a dam site, 55 acres as a site for an auxiliary spillway, and the remainder for use as part of the reservoir for said project.

The case involves the measure of compensation for the taking of respondent's dam site lands. Ordinarily, the measure of compensation in a condemnation proceeding does not involve a Federal question. In this case, however, it does, because the Supreme Court of Oklahoma, on the first appeal—reaffirmed on the second appeal as “the law of the case”—held that the rule for the measure of compensation established by that Court “applies only to those adaptable uses to which the condemnee or his ordinary grantee may lawfully place the lands.” The respondent could acquire the right to use its lands as a dam site for a hydroelectric project on Grand River only through compliance with the Federal Power Act, because the Grand River is such a stream as Congress has jurisdiction over under the Interstate Commerce Clause.

It is not claimed that the State Supreme Court could not have eliminated the Federal question by holding that respondent was entitled to have its compensation determined on the basis of the adaptability of its dam site lands for dam site use without having the right to place the lands to such use. The Court did not so rule, but specifically made the existence of such right a condition precedent to the consideration of such adaptability in fixing compensation.

The immediate question involved is therefore whether the respondent, Grand-Hydro, was entitled to have the adaptability of a part of its lands as a dam and auxiliary

spillway site for a proposed hydro-electric project considered in fixing just compensation for the taking thereof by petitioner on January 19, 1940, but the ultimate questions upon which the answer to the immediate question depends are: (1) Did the State of Oklahoma, through its Water Code, or the United States, through the Federal Power Act, have control over the use of the waters of Grand River for the production of electric power and energy on the date of taking, and (2) if the United States had such control, does the Federal Power Act recognize and preserve the rights of respondent acquired under state laws and impose upon petitioner the obligation to pay compensation for the taking based on the adaptability of the lands for such purpose.

Under local law, as declared by the State Supreme Court, such adaptability can not be considered unless the respondent had the lawful right on the date of taking to use its lands for such purpose. *Grand-Hydro v. Grand River Dam Authority*, 192 Okla. 693, 139 P. (2d) 798; *Lawton Rapid Transit Railroad Co. v. City of Lawton*, 31 Okla. 458, 122 P. 212.

Respondent claimed and asserted (1) that it had such lawful right by virtue of a permit issued to it on August 29, 1931 by competent state authorities under and in accordance with the Water Code of the State of Oklahoma (S. L. 1905, p. 275, as amended to date; 82 O.S.A., secs. 1-104, and S. L. 1927, p. 91, as amended to date; 82 O.S.A., secs. 481, 482), without complying with the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Federal Power Act of August 26, 1935 (49 Stat. 836), and (2) that if the Federal Power Act applied, Section 27 of the Act recognized and preserved the respondent's rights acquired under its state permit, and Section 10(c) of the Act imposed on petitioner the obliga-

tion to pay compensation for the taking *based upon such adaptability*.

The petitioner claimed and asserted (1) that the state permit was invalid and conferred no such right of use because the state statutes under which it was issued, as applied to the Grand River, are repugnant to the Commerce Clause of the Federal Constitution (art. I, sec. 8, cl. 3), and the Federal Power Act enacted by Congress pursuant thereto, and (2) that it possessed the exclusive right on the date of taking to utilize the waters of the river at the Pensacola location by virtue of a license issued to it by the Federal Power Commission on July 26, 1939, effective as of January 1, 1939, and (3) that Section 27 of the Act does not recognize or preserve any rights of the respondent under its state permit to utilize the waters of the river for the *generation of electric power and energy*, and that Section 10(c) of the Act does not impose on the petitioner any obligation to pay compensation *based upon the adaptability of said lands as a dam and auxiliary spillway site*.

The State Supreme Court, in the judgment sought to be reviewed, has (1) sustained the claim of the respondent under State law and denied the claim of the petitioner under Federal law to use the lands involved for dam site purposes; (2) sustained the construction placed by respondent and denied the construction placed by petitioner upon Sections 10(c) and 27 of the Federal Power Act, and (3) allowed the fixing of just compensation for the taking of the dam site lands *on the basis of their adaptability for dam site use*.

The petitioner is a public corporation, created by an act of the Oklahoma Legislature (S. L. 1935, Art. IV, Ch. 70; 82 O. S. A., Secs. 861-881), as a conservation and reclamation district for the purpose of conserving and developing the forests, water, and hydroelectric power of the State of

Oklahoma, including the control, storage, preservation, and distribution of the waters of Grand River and its tributaries for irrigation, power, and other useful purposes. The act went into effect on July 29, 1935, and granted to the petitioner the *exclusive* right to appropriate the waters of Grand River for hydroelectric purposes.

The respondent is a private corporation, incorporated on November 6, 1929, under the laws of the State of Oklahoma for the purpose of generating and distributing electric power and energy (R. 113).

The Commissioners appointed by the court assessed the damages at \$281,802.74 (R. 65), and both the petitioner and respondent in due time filed demands for jury trial (R. 72, 73). A jury trial followed in November, 1940, which resulted in a verdict for respondent in the sum of \$136,250.00, and a judgment in accordance therewith (R. 74). The respondent prosecuted an appeal to the Supreme Court of Oklahoma and secured a reversal and new trial on the ground that the trial court had erroneously excluded the testimony of four expert witnesses offered by respondent as to the value of the dam site lands based on their adaptability for dam site purposes (R. 88), 192 Okla. 693, 139 P. (2d) 798.¹

The second trial came on in April, 1945 and resulted in a verdict of \$800,000.00 in favor of respondent (R. 629), on which the trial court rendered judgment, including interest on \$518,197.26 from January 19, 1940, at the rate of six per cent per annum. From this judgment the petitioner prosecuted an appeal to the Supreme Court of Oklahoma. The cause was affirmed by that Court on May 20, 1947 (R. 670)² and petitioner in due time, on June 17, 1947, applied to the Supreme Court for a reconsideration and rehearing.

¹ Appendix "A."

² Appendix "B."

(R. 678), which was denied by that Court on July 1, 1947 (R. 707).

The promoters of respondent, in February, 1929, employed the Fargo Engineering Company of Jackson, Michigan, to investigate and make a report on the feasibility of developing the Grand River for the production of electric power and energy (R. 242, 272, 254). Prior to that time they held a permit of some kind from the State of Oklahoma for a hydro development on Grand River, which included a dam at the Pensacola site (R. 273), but this permit had lapsed and was abandoned (R. 144). The Fargo Engineering Company made a report of its investigations on May 28, 1929, including its recommendations (R. 391, *et seq.*). It had previously received, on April 29, 1929, a geological report on the Pensacola dam site made by Charles T. Kirk, a geologist of Tulsa, Oklahoma, on April 23, 1929 (R. 294). These reports were submitted to Mead and Seastone, consulting engineers of Madison, Wisconsin, who made a report to the promoters of respondent on July 3, 1929 (R. 254). Following receipt of these reports by its promoters, the respondent was incorporated under the laws of Oklahoma on November 6, 1929, and proceeded in the latter part of 1929 and during 1930 to acquire the lands involved herein (R. 125). The depression began in the latter part of 1929 and lasted several years. The respondent then directed its engineers to locate another site for its Dam No. 1 where a less expensive project could be built (R. 282, 283, 288). They located the Tynon Bluff site, some seven miles up the river from the Pensacola site, twelve miles according to the engineer's testimony (R. 281), and proceeded to drill some thirty odd test holes on that site (R. 308, 312), to see if the fault found in the vicinity of the Pensacola site extended up to the Tynon Bluff site. The respondent then, on July 14, 1931, filed its application with the state authorities for a permit to build its Dam No. 1 at

the Tynon Bluff location, and the application was approved by the Conservation Commission on the 29th day of August 1931 (R. 129). This permit authorized the respondent to build a fifty foot power dam at the Tynon Bluff site and a fourteen foot equalizing dam at one of two locations below the dam, one of which locations is above and the other below the land involved in the Pensacola site (R. 131, 491, *et seq.*, and original Exhibit No. 11), but provided that the respondent must complete one-fifth of the construction work within two years and all of it within four years from August 29, 1931, and actually apply the waters of the river to beneficial use within four years from the completion date (R. 133). It never commenced or completed any part of the proposed construction work (R. 179), and never engaged in the business of generating or distributing power and energy (R. 178). The Tynon Bluff lands are not involved in this proceeding. They are included in a separate condemnation proceeding in the District Court of Delaware County, Oklahoma, which has been held in abeyance until the final determination of this proceeding.

The respondent never complied with any of the provisions of the Federal Power Act. It never filed with the Federal Power Commission a Declaration of Intention to construct its proposed project, or obtained from the Commission a determination that its proposed project would not affect the interests of interstate commerce. It never applied to the Commission for a license to construct, maintain, and operate its proposed project, or any other project, on Grand River, and never obtained from the Commission such a license (R. 111).

The petitioner filed, on December 15, 1937, with the Federal Power Commission, its Declaration of Intention to construct, maintain, and operate its hydroelectric project on Grand River at the Pensacola site. Upon the hearing of said declaration, the Commission, on February 11, 1938,

found and determined that the construction and operation of said project, as proposed, would affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary, and would affect the interests of interstate commerce (R. 485). On May 3, 1938, the petitioner filed with the Federal Power Commission its application for a license to construct its proposed project at the Pensacola site (R. 104). The Commission entered an order on January 27, 1939, finding and determining that the petitioner's proposed project was desirable and justified in the public interest for the purpose of improving or developing the Grand River and the Arkansas River, to which it is tributary, for the use or benefit of interstate commerce, and authorized the issuance of a license therefor (R. 476), and on July 26, 1939, the Commission issued the License to the petitioner, effective from January 1, 1939, reciting in the License its determination that the Grand River is a stream over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states (R. 462).

The petitioner and respondent stipulated on the trial (R. 228) and the Court found under the law (R. 621) that the date of taking was January 19, 1940.

The State Supreme Court, on the first appeal, held that adaptability of land for any particular use can not be considered in fixing just compensation in a condemnation proceeding, unless the owner, or his ordinary grantee, has the lawful right to use the land for such purpose and will do so within a reasonable time, *Grand-Hydro v. Grand River Dam Authority*, 192 Okla. 693, 139 (2d) 798, and adhered to and reaffirmed this ruling on the second appeal as "the law of the case." It held, however, on the first appeal that respondent's state permit of August 29, 1931, was a perpetual franchise which had not been abandoned, had not expired by its own limitation, and had not been terminated

by judicial decree, and that respondent on the date of taking had the right under said permit to appropriate the waters of Grand River for the production of electric power and energy, and to use the dam site lands involved herein for that purpose, and that having such right under said permit, the respondent was entitled to have included in and as a part of just compensation for the taking of said lands any special value due to their adaptability for dam site purposes, and that the trial court erred in excluding the testimony of respondent's expert witnesses as to value of the dam site lands based on their adaptability for dam site use.

On the second trial of the case, new evidence was introduced on behalf of the petitioner, including (1) the stipulation that the respondent had never complied with the provisions of the Federal Power Act, and that the respondent did not hold and had never held a permit or license of any kind issued by the Federal Power Commission for the construction, maintenance, or operation of a hydroelectric project on Grand River (R. 111); (2) the petitioner's Declaration of Intention to construct, maintain, and operate its proposed project on Grand River at the Pensacola location, the record of the Federal Power Commission showing the filing of the petitioner's Declaration of Intention, the Order of the Federal Power Commission made thereon, the application of the petitioner for a license to construct its hydroelectric project at the Pensacola location, the Order of the Federal Power Commission entered thereon, and the License issued by the Federal Power Commission to the petitioner pursuant to its application (R. 456-491), and (3) the Fargo Engineering Company's report of May 28, 1929, used by respondent's expert witnesses as to dam site value as a basis for their testimony, showing that respondent's proposed project at the Pensacola site under consideration before respondent ap-

plied for its state permit to construct its project at the Tynon Bluff site, was to all intentions and purposes the same size as the petitioner's project licensed by the Federal Power Commission under the Federal Power Act (R. 392), although its permit did not cover the Pensacola site, and (4) excerpts from the report of the Army Engineers, known as House Document No. 107, 76th Congress, First Session (R. 162-177, 445-455).

The petitioner asserted in the trial court on the second trial and in the Supreme Court on the second appeal of this case, that the Congress of the United States had jurisdiction over the Grand River in Oklahoma under the Commerce Clause of the Federal Constitution; that the Congress assumed such jurisdiction upon the passage of the Federal Water Power Act of June 10, 1920; that under said act, as amended by the Federal Power Act of August 26, 1935, the Federal Power Commission was authorized and empowered to issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining hydroelectric projects on Grand River; that Section 23(b) of the Federal Power Act of August 26, 1935, makes it unlawful for the respondent, for the purpose of developing electric power, to construct, maintain, or operate any project or works on Grand River without complying with the provisions of the Federal Power Act, and that respondent had no lawful right to construct a hydroelectric project on Grand River, or use its dam site lands for that purpose, without filing with the Federal Power Commission its Declaration of Intention to construct such project and obtaining from the Federal Power Commission (a) a determination that its proposed project would not affect the interests of interstate or foreign commerce, or (b) a license for such project under

and in accordance with the provisions of the Federal Power Act; that under Section 10 of the Act of Congress of March 3, 1899 (30 Stat. 1151), the respondent is prohibited from creating any obstruction, not affirmatively authorized by Congress, to the navigable capacity of the Arkansas River; that under Federal law the respondent would not have the lawful right to use its dam site lands for dam site purposes at the Pensacola site for a hydroelectric project, and was prohibited from making such use of said lands, without affirmative authorization from the Congress obtained through compliance with the Federal Power Act; that the use of such lands for such purpose without compliance with the Federal Power Act is specifically declared under Section 23(b) of said Act to be unlawful; that respondent's state permit issued under and pursuant to Chapter 40, Revised Laws of Oklahoma 1910, as amended, and Chapter 70 of the Acts passed by the Regular Session of the Eleventh Legislature of Oklahoma, as amended, was invalid and conferred no rights upon respondent to construct a hydroelectric project on Grand River and use its lands as a dam site for such project because said state laws were inoperative so far as the Grand River is concerned and are repugnant to Clauses 3 and 18 of Section 8, Article I, and Clause 2 of Article VI of the Constitution of the United States, and Section 10 of the Act of Congress of March 3, 1899, 30 Stat. 1151, and the Federal Water Power Act of June 10, 1920, 41 Stat. 1063, as amended by the Federal Power Act of August 26, 1935, 49 Stat. 836; that the petitioner had the *exclusive* right to construct a hydroelectric project on the Grand River at the Pensacola site and to appropriate the waters of said river for the purpose of producing electric power and energy under its license issued by the Federal Power Commission pursuant to the Federal Power Act, and that the respondent, not having the lawful right under Federal law to use its dam site lands for a hydroelectric

project, was not entitled to have the adaptability of said lands for such purpose considered in fixing just compensation for the taking thereof, and that the testimony of its four expert witnesses as to the value of the dam site lands based upon their adaptability for dam site purposes was incompetent and should be excluded from consideration by the jury.

The applicability of these Federal laws and the inoperativeness of the State laws, and the invalidity of respondent's State permit, were raised during the proceedings in this case (1) by objection to the valuation testimony of each of the four expert witnesses offered by respondent, and exception to the admission thereof in evidence (R. 321, 345, 361, 379); and (2) by motion to strike out all the valuation testimony of each of said four expert witnesses based on the adaptability of the dam site lands for dam site use interposed (a) at the close of respondent's evidence in chief (R. 387, *et seq.*), and (b) at the close of all the evidence (R. 591), and exception to the overruling thereof; (3) by request for instructions to the jury (R. 592-615), and exception to the refusal thereof; (4) by objection to the trial court's Instruction No. 10 (R. 623), and exception to the giving thereof; (5) by motion for new trial (R. 629) and exception to the overruling thereof (R. 642); (6) by assignment of errors in the Supreme Court of Oklahoma (R. 2), and brief and oral argument in said Court; (7) and by petition for reconsideration and rehearing in the Supreme Court (R. 678).

II

Statement of Points Relied Upon by Petitioner

1. The Supreme Court of Oklahoma has failed and refused to apply to the facts established in the evidence applicable Federal laws, to-wit: Clauses 3 and 18 of Section 8,

Article I, and Clause 2 of Article VI of the Constitution of the United States; the Act of Congress of March 3, 1899 (30 Stat. 1151), and the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Federal Power Act of August 26, 1935 (49 Stat. 836), and erroneously held that the respondent had the right under its State permit on the date of taking to appropriate the waters of Grand River for the production of hydroelectric energy, and to use its dam site lands at the Pensacola site for that purpose without complying with the applicable provisions of the Federal Power Act by filing a Declaration of Intention with the Federal Power Commission to construct, maintain, and operate a hydroelectric project on said river, and obtaining from the Federal Power Commission (a) a determination that its proposed project would not affect the interests of interstate or foreign commerce, or (b) a license for such project under and in accordance with the provisions of the Federal Power Act. • U. S. Constitution, Art I, Sec. 8, Cls. 3 and 18, Art. VI, Cl. 2; Act of Congress of March 3, 1899 (30 Stat. 1151); Act of Congress of June 10, 1920 (41 Stat. 1063); Act of Congress of August 26, 1935 (49 Stat. 836); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143; *Oklahoma, ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 85 L. Ed. 1487; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243; *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690 43 L. Ed. 1136; *Sanitary District of Chicago v. United States*, 266 U. S. 405, 69 L. Ed. 352; *Wisconsin v. Illinois*, 278 U. S. 367, 73 L. Ed. 423; *United States v. Appalachian Electric Power Co.*, 107 F. (2d) 769 (including dissenting opinion of Judge Parker, p. 798); *Georgia Power Co. v. Federal Power Commission*, 152 F. (2d) 908; *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. (2d) 743 (certiorari denied June 18, 1945, 89 L. Ed. 1996); *Niagara Falls Power Co. v. Fed-*

eral Power Commission, 137 F. (2d) 787 (certiorari denied November 22, 1943, 88 L. Ed. 477; rehearing denied December 6, 1943, 88 L. Ed. 478); *Pennsylvania Water and Power Co. v. Federal Power Commission*, 123 F. (2d) 155 (certiorari denied February 16, 1942, 86 L. Ed. 1205); *Petition of Bellows Falls Hydroelectric Corp.* (Vt.), 47 Atl. (2d) 409.

2. Having held that adaptability for dam site use can not be considered unless respondent had the lawful right to use its lands for dam site purposes, the Supreme Court of Oklahoma erroneously held in its opinion that the respondent is entitled to have the adaptability of its Pensacola dam site lands for use as a dam site for a hydroelectric project considered in fixing the just compensation for the taking of said lands without acquiring the right under Federal law to construct, maintain, and operate thereon a dam for impoundage of water for use in the production of electric power and energy and to use said lands for that purpose. *Grand-Hydro v. Grand River Dam Authority*, 192 Okla. 693, 139 P. (2d) 798; *Lawton Rapid Transit Railroad Co. v. City of Lawton*, 31 Okla. 458, 122 Pac. 212; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. Ed. 1063; *Olson v. United States*, 292 U. S. 246, 78 L. Ed. 1236; *Olson v. United States*, 67 F. (2d) 24; *Continental Lapid Co. v. United States*, 88 F. (2d) 104 (certiorari denied October 11, 1937, 82 L. ed. 552); *United States v. Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877; *Central Pacific Railroad Co. v. Pearson*, 35 Cal. 247.

3. The Supreme Court of Oklahoma has erroneously construed Section 27 of the Federal Power Act (16 U. S. C. A. 821) and erroneously held in effect that said section recognizes and preserves the rights of the respondent under its State permit to appropriate the waters of Grand River for the production of electric power and energy, and to use its dam site lands for that purpose. *First Iowa Hydro-*

Electric Cooperative v. Federal Power Commission, 328 U. S. 152, 90 L. Ed. 1143; *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606; *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. (2d) 743 (certiorari denied June 18, 1945, 89 L. Ed. 1996); *Niagara Falls Power Co. v. Federal Power Commission*, 137 F. (2d) 787 (certiorari denied November 22, 1943, 88 L. Ed. 477; rehearing denied December 6, 1943, 88 L. Ed. 478); *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F. (2d) 155 (certiorari denied February 16, 1942, 86 L. Ed. 1205).

4. The Supreme Court of Oklahoma has erroneously construed Section 10(c) of the Federal Power Act (16 U. S. C. A. 805), and Article 17 of petitioner's License, and erroneously held that said section and article impose a liability on the petitioner to pay the respondent for its Pensacola dam site lands compensation based upon their adaptability for dam site use. *Corrigan Transit Co. v. Sanitary District of Chicago*, 137 Fed. 851; *Alabama Power Co. v. Smith*, 229 Ala. 105, 155 So. 601, 606; *Louisville Hydroelectric Co. v. Coburn*, 270 Ky. 631, 110 S. W. (2d) 445, 448; *Humpich's Trustees v. Louisville Gas and Electric Co.*, 269 Ky. 558, 108 S. W. (2d) 509, 511.

5. The Supreme Court of Oklahoma has erroneously construed Clause 3 of Section 8 of Article I of the Federal Constitution, and misapplied Clause 18 of said section, and Clause 2 of Article VI of the Federal Constitution, and Acts of Congress passed in pursuance thereof, namely, the Act of Congress of March 3, 1899 (30 Stat. 1151); the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), and the Federal Power Act of August 26, 1935 (49 Stat. 836), and erroneously held that the Grand River in Oklahoma is not such a stream as Congress has jurisdiction over under its authority to regulate commerce with foreign nations and among the several States. *Oklahoma, ex rel. Phillips v.*

Guy F. Atkinson Co., 313 U. S. 508, 85 L. Ed. 1487; *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. Ed. 1136; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243; *Grand River Dam Authority v. Going*, 29 F. Supp. 316; *Sanitary District of Chicago v. United States*, 266 U. S. 405, 69 L. Ed. 352; *Wisconsin v. Illinois*, 278 U. S. 367, 73 L. Ed. 423; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143; *Georgia Power Co. v. Federal Power Commission*, 152 F. (2d) 908; *United States v. Appalachian Electric Power Co.*, 107 F. (2d) 769 (dissenting opinion of Judge Parker, p. 798); *Arizona v. California*, 283 U. S. 423, 76 L. Ed. 1154; *United States v. Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609; *United States v. Mackey*, 214 Fed. 137; House Document No. 107, 76th Congress, First Session; Flood Control Act of June 28, 1938, 52 Stat. 1215, 1218; Rivers and Harbors Act of August 18, 1941, 55 Stat. 638, 645; Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Federal Power Act of August 26, 1935 (49 Stat. 836); Findings of Federal Power Commission in the matter of Declaration of Intention of Grand River Dam Authority, Docket No. DI-141 of date February 11, 1938; Order of Federal Power Commission in the matter of Application of Grand River Dam Authority for a License for Project No. 1494 of date January 27, 1939; License issued to Grand River Dam Authority by Federal Power Commission for Project No. 1494, under date of July 26, 1939, effective January 1, 1939.

6. The Supreme Court of Oklahoma has, by its decision, wrongfully deprived the petitioner of the benefits of its exclusive right granted under Federal law in its Federal Power License issued July 26, 1939, effective January 1, 1939, to construct, maintain, and operate a hydroelectric project on Grand River at the Pensacola location, and

erroneously permitted the assessment of just compensation for the taking of the Pensacola dam site on the theory that respondent had the right under its State permit to construct, maintain, and operate a hydroelectric project at said location, and to use its lands as a dam site for such project without complying with the provisions of the Federal Power Act by filing with the Federal Power Commission its Declaration of Intention and obtaining from said Commission either (a) a determination by the Federal Power Commission that its proposed project would not affect the interests of interstate or foreign commerce, or (b) a license for such project under and in accordance with the provisions of the Federal Power Act. Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Federal Power Act of August 26, 1935 (49 Stat. 836); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. Ed. 1063; *Olson v. United States*, 292 U. S. 246, 78 L. Ed. 1236; *Olson v. United States*, 67 F. (2d) 24; *Continental Land Co. v. United States*, 88 F. (2d) 104 (certiorari denied October 11, 1937, 82 L. Ed. 552).

Grounds for Believing That the Questions Presented Are Substantial and That the Writ Applied for Should Be Granted.

Under the decision of the Supreme Court of Oklahoma on the first appeal of this case, reaffirmed in the judgment sought to be reviewed, the adaptability of respondent's lands as a dam site for a hydroelectric project could not be considered in fixing just compensation for the taking thereof unless the respondent had the lawful right on the date of taking to use its lands for that purpose. *Grand River Dam Authority v. Grand-Hydro*, 192 Okla. 693, 139

P. (2d) 798. The respondent asserted the right to use its lands at the Pensacola location for that purpose under and by virtue of its permit issued pursuant to the Water Code of the State of Oklahoma for the Tynon Bluff dam site, and by reason thereof, the right to have the adaptability of its lands for dam site use considered in fixing just compensation for their taking by the petitioner. The petitioner asserted the exclusive right under its license issued pursuant to the Federal Power Act to construct, maintain, and operate its hydroelectric power project at the Pensacola location on Grand River.

The Supreme Court of Oklahoma, in the judgment sought to be reviewed, holds that the State laws under which respondent's permit was issued are applicable; sustained the validity of the permit issued thereunder and allowed compensation for the taking of the dam site lands to be fixed on the theory that the State laws were applicable; that the permit issued thereunder was valid, and vested in respondent the right to use its dam site lands for that purpose on the date of taking. It refused to recognize and denied the applicability of Federal laws and the petitioner's exclusive rights granted thereunder to construct, maintain, and operate its hydroelectric project at the Pensacola location on Grand River and held that if the Federal laws were applicable, Section 27 of the Federal Power Act (16 U.S.C.A. 821) recognized and preserved the right of respondent under its State permit to appropriate the waters of Grand River for the production of electric power and energy, and to use its dam site lands for that purpose, and that Section 10(c) of that Act and Article 17 of petitioner's License imposed on petitioner the liability to pay respondent for its Pensacola dam site lands compensation *based upon their adaptability for dam site use.*

The jurisdiction of the Court is invoked under Section 237 of the Judicial Code, as amended (28 U.S.C.A. 344),

particularly Section 237(b) of the Code (28 U.S.C.A. 344(b)). Under authority of this Section of the Judicial Code this Court has granted certiorari and taken jurisdiction in cases decided by the highest Court of the State involving (a) the interpretation of navigation rules prescribed by Federal statute (*Belden v. Chase*, 150 U.S. 674, 791); (b) the protection of all of the substantial rights of the parties in an action in a State Court for damages under Section 33 of the Merchant Marine Act and for maintenance and cure (*Garrett v. Moore-McCormick Company*, 317 U.S. 239); (c) the construction of clauses of a bill of lading adopted by the Interstate Commerce Commission and prescribed by Congress for interstate rail shipments (*Illinois Steel Company v. B. & O. R. Co.*, 320 U.S. 508); and (d) the effect of a license for a radio station issued by the Federal Communications Commission (*Radio Station WOW, Inc., v. Johnson*, 326 U. S. 120).

It is believed that the questions involved in this case are substantial Federal questions and justify the granting of the writ of certiorari applied for under Section 237 of the Judicial Code, as amended, because (a) the Supreme Court of Oklahoma actually and necessarily passed on the Federal questions involved sustaining asserted rights of the respondent under State laws and denying asserted rights of the petitioner under Federal laws; (b) the Supreme Court of Oklahoma has misapplied and misconstrued applicable Federal laws; (c) the rulings of the Supreme Court of Oklahoma are in conflict with and contrary to the following decisions of this Court: *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. ed. 1136; *Sanitary District of Chicago v. United States*, 266 U. S. 405, 69 L. ed. 352; *Wisconsin v. Illinois*, 278 U. S. 367, 73 L. ed. 423; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. ed. 243; *Oklahoma, ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 85 L. ed. 1487; and *First Iowa Hydro-*

Electric Cooperative v. Federal Power Commission, 327 U. S. 152, 90 L. ed. 1143; (d) its ruling on the effect of Section 10(c) of the Federal Power Act is contrary to the holding of the Supreme Court of Alabama in the case of *Alabama Power Company v. Smith*, 229 Ala. 105, 155 S. 601, and of the Court of Appeals of Kentucky in the case of *Humpich's Trustees v. Louisville Gas and Electric Co.*, 269 Ky. 558, 108 S. W. (2d) 509, 511, and *Louisville Hydro-Electric Company v. Coburn*, 270 Ky. 631, 110 S. W. (2d) 445, and of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Corrigan Transit Company v. Sanitary District of Chicago*, 137 Fed. 851, and probably contrary to the view of this Court; and (e) the decision of the Supreme Court of Oklahoma, if allowed to stand, might seriously affect river developments by public and private bodies under licenses from the Federal Power Commission not only in Oklahoma but throughout the United States, and would create a shadow land of difference between Federal and State laws in which a developer, notwithstanding his license from the Federal Power Commission, would proceed at his peril.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Oklahoma charging said Court to certify and send this Court a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Oklahoma had in the case numbered and entitled on its docket "*Grand River Dam Authority, a public corporation, v. Grand-Hydro, a private corporation, No. 32,399*", to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of said Supreme Court of the State of Oklahoma be reversed by this Court, and for such relief as to this Court may seem proper.

A certified copy of the transcript of record in this case in the Supreme Court of the State of Oklahoma is filed herewith in conformity with Rule No. 38 of this Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Court Below

The opinion of the Supreme Court of Oklahoma sought to be reviewed has not been officially reported. It was filed May 20, 1947 (R. 670). A Petition for Rehearing was filed on June 17, 1947 (R. 678), and by the Court denied on July 1, 1947 (R. 707).

II.

Jurisdiction

The ground on which the jurisdiction of the Supreme Court of the United States is invoked is that provided by Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and the Act of January 31, 1928, 45 Stat. 54, 28 U.S.C.A. 344, providing for the issuance of writ of certiorari by the Supreme Court of the United States to review a final judgment rendered by the highest court of the State in which a decision could be had.

III.

The nature of the case, the manner in which the Federal questions were raised, and the pertinent facts, are set forth in the "Summary Statement of the Matter Involved" appearing in the Petition for Writ of Certiorari, and are adopted by reference as a part of this brief.

IV.

Specification of Errors

The errors of the Supreme Court of Oklahoma relied upon for reversal of its judgment in this case are set forth in the

Petition for Writ of Certiorari under "Statement of Points Relied Upon by Petitioner" and are adopted by reference as a part of this brief.

V.

ARGUMENT**Arid States Doctrine of Water Rights Prevails in Oklahoma**

Under the statute law of Oklahoma, water flowing in a definite stream belongs to the public and a riparian owner can not prevent the natural flow thereof (60 O.S.A., sec. 60), and the right to put such water to a beneficial use can be acquired only through compliance with the Water Code of the State (82 O.S.A., Sec. 1, *et seq.*), as amended by Sections 2 and 3 of the Act of the Oklahoma Legislature, approved January 27, 1927 (S.L. 1927, p. 91). The respondent applied for and obtained its water permit to construct, maintain, and operate its proposed hydroelectric project on Grand River in Oklahoma under and pursuant to these State statutes.

Applicable Federal Laws

Under Clause 3 of Section 8, Article I, of the Federal Constitution, it is provided that the Congress shall have Power to Regulate Commerce with foreign nations, and among the several states, and with the Indian tribes. Under Clause 18 of said section and article of the Constitution, the Congress is authorized to make all laws which shall be necessary and proper for carrying into execution such powers.

Under Clause 2 of Article VI of the Federal Constitution it is provided:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every

state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Under authority of Clauses 3 and 18 of Section 8 of Article I of the Federal Constitution, the Congress enacted the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), and the Federal Power Act of August 26, 1935 (49 Stat. 836).

Under Section 4(e) of the Federal Power Act (16 U.S.C.A. 797), the Federal Power Commission is authorized and empowered to issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any state thereof, or to any state or municipality for the purpose of constructing, operating, and maintaining hydroelectric projects in any stream or other body of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, and under Section 23(b) of the Federal Power Act (16 U.S.C.A. 817) it is made unlawful for any such person, corporation, state or municipality, for the purpose of developing electric power, to construct, operate, or maintain any project works in any such stream without applying for and receiving from the Federal Power Commission a license therefor.

Section 23(b) of the Federal Power Act (16 U.S.C.A. 817) provides that:

"It shall be unlawful for any person, state, or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the territories), or utilize the surplus water or water

power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, state, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, state, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with state laws."

The Congress, in the Federal Power Act, set up and constituted the Federal Power Commission as an administrative agency to determine, as occasion therefor arose, whether a particular stream sought to be utilized for power purposes, is such a stream as Congress has jurisdiction over under the Commerce Clause, laid down a formula to guide the Federal Power Commission in making such determination, that is, whether or not such use of the stream would affect the navigable capacity of any navigable waters of the United States and thereby affect the interests of interstate or foreign commerce, and prohibited the use of such waters for power purposes except in compliance with said act.

The laws of the United States are laws of the several states, and just as much binding on citizens and courts thereof as the state laws are. *Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, 838; *Hines v. Lowrey*, 305 U.S. 85, 83 L. ed. 56.

When a Federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation are Federal questions, the answers to which are controlled by Federal law and Federal policy. To the Federal statute and policy, conflicting state law and policy must yield. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 87 L. Ed. 165; *Leo Feist, Inc., v. Young*, 138 F. (2d) 972.

Grand River is Subject to Federal Control

The Grand River in Oklahoma is such a stream as Congress has control over under the Commerce Clause of the Federal Constitution. It is a non-navigable stream, except for two miles up the river from its mouth; although it might well be considered navigable under the ruling of the United States Supreme Court in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243. It is, however, a principal and immediate tributary to the Arkansas River, which is a navigable water of the United States all the way up to the mouth of the Grand River. The Court will take judicial knowledge of the fact that the Arkansas River is a navigable water of the United States up to the mouth of Grand River, and that Grand River is an important as well as the principal tributary of the Arkansas. *Arizona v. California*, 283 U. S. 423, 76 L. Ed. 1154; *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. Ed. 1136; *Grand River Dam Authority v. Going*, 29 F. Supp. 316; *United States v. Brewer-Elliott Oil & Gas Co.* 249 Fed. 609; *United States v. Mackey*, 214 Fed. 137; *Board of County Commissioners v. Smith*, 47 Okla. 184, 148 Pac.

111; *State v. Nolegs*, 40 Okla. 479, 139 Pac. 943. The record in this case is replete with evidence as to the characteristics of the Grand River, including its drainage area, the volume of its flow, both during ordinary and flood periods, for many years, which established beyond controversy that the Grand River in Oklahoma is such a stream as Congress has jurisdiction over under the Commerce Clause of the Constitution. Army Engineers Report House Document No. 107, 76th Congress, First Session (R. 445-455). Fargo Engineering Company's Report (R. 391).

The Pensacola reservoir is one of the reservoirs included in the general comprehensive plan for flood control and power development in the Arkansas River Basin approved by the 1938 Flood Control Act (R. 452), (52 Stat. 1215, 1218). In addition, the Court will take judicial knowledge of the fact that Congress has approved the construction by the Army Engineers of the Markham Ferry and Fort Gibson Dams on Grand River for the dual purpose of flood control and power production (55 Stat. 638, 645), and that the Corps of Engineers made a survey of Grand River for flood control and power development under authority of Section 1 of the Rivers and Harbors Act of January 21, 1927, and Section 6 of the Rivers and Harbors Act of August 30, 1935, and made a report to the Secretary of War on January 4, 1939, which in turn was transmitted to Congress by the Secretary of War on January 12, 1939, which report is known as House Document No. 107, 76th Congress, First Session, in which the Army Engineers said:

"The Neosho River, known as the Grand River in its lower reaches, is not generally considered navigable with the exception of its lower 2 miles. The stream rises in the rolling hill area in east central Kansas, near Parkerville (Mile 452), flows southeasterly 297 miles in Kansas, thence in a southerly direction across the northeast portion of the State of Oklahoma, a distance

of 163 miles, to its junction with the Arkansas River near Fort Gibson, Oklahoma (Mile 2). It has a total length of 460 miles and drains a total area of 12,660 square miles, of which 6,285 are in Kansas, 2,995 in Missouri, 415 in Arkansas, and 2,965 in Oklahoma." (R. 453)

and:

"With the exception of its lower 2 miles, the Grand (Neosho) River is not generally considered a navigable stream, nor is there any demand for such development. While the operation of the desired power plants could not be expected to greatly benefit the present open-river navigation conditions on the Arkansas River, the resulting addition to low-water flows would unquestionably improve the year-around navigation conditions and, in the event that works for a canalized Arkansas River should be constructed for navigation in the future, the regulated flow from a power plant would be of material value in providing a necessary water supply for lockage, leakage, and evaporation losses in the canalized system." (R. 454)

and:

"Valuable benefits from the control of floods of the Grand River would accrue along the Arkansas River. Reduction in the flood flows of the Arkansas River also would be of benefit on the lower Mississippi River. The proposed Pensacola reservoir is one of the reservoirs included in the general comprehensive plan for flood control in the Arkansas River Basin approved by the 1938 Flood Control Act." (R. 452)

and:

"The Grand (Neosho) River is a main contributor to flood flows in the Arkansas River and hence in the lower Mississippi River. The reduction of its flood flows would benefit the four States of Oklahoma, Arkansas, Mississippi, and Louisiana." (R. 455)

and:

"While the plan proposed by the district engineer makes no allocation of capacity at any of the three sites to the needs of navigation, the regulation of flow which the plan insures in time of flood, due to the flood-control allocations, and in time of low-water flow, due to the power allocations, can be anticipated to improve navigation conditions in the Arkansas River below. Such improvement would benefit Oklahoma and Arkansas since portions of the river are considered navigable in both states, and to a lesser degree Mississippi and Louisiana, on the navigable Mississippi River below the mouth of the Arkansas" (R. 455).

and that:

"The Grand (Neosho) River is one of the most important streams in the Arkansas River Basin, owing to its large flood flows, potential power possibilities, and contribution to low-water flow in the Arkansas River at the head of the portion generally considered navigable. Since it is interstate in all three respects, interest in its development transcends State boundaries and therefore becomes of national importance." (R. 454)

After investigating the Declaration of Intention filed by petitioner, the Federal Power Commission determined that the construction and operation of the Pensacola project would affect navigable states of the Arkansas River, a navigable water of the United States, to which the Grand River is tributary, and would affect the interests of interstate commerce (R. 486). In its order authorizing the issuance of petitioner's license, the Commission found and determined on January 27, 1939 that the Pensacola project "is desirable and justified in the public interest for the purpose of improving or developing the Grand River and the Arkansas River, to which it is tributary, for the use or benefit of interstate commerce." (R. 477). In the license

issued to the petitioner, the Commission recited its determination that the Grand River is a stream over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states (R. 462).

The United States District Court for the Northern District of Oklahoma, in the case of *Grand River Dam Authority v. Going*, 29 Fed. Supp. 316, took judicial knowledge of the fact that the Arkansas River is navigable to the mouth of the Grand River; that the Grand River is an important and principal immediate tributary of the Arkansas River and held that the Grand River is such a stream as Congress has jurisdiction over under the Commerce Clause of the Constitution.

After studies and surveys authorized by Congress under Section I of the Rivers and Harbors Act of January 21, 1927 (44 Stat. 1010, 1015); Section 6 of the Rivers and Harbors Act of August 30, 1935 (49 Stat. 1028, 1048), and Sections 6 and 7 of the Flood Control Act of June 22, 1936 (49 Stat. 1570, 1596), Major General J. L. Schley, Chief of Engineers, recommended that the Peasacola, Markham Ferry, and Fort Gibson reservoirs should be constructed and operated by the Federal government as one coordinated unit in the combined interests of flood control and power development (House Document No. 107, 76th Congress, First Session, p. 6), and the Congress, thereafter, in the Act of August 18, 1941 (55 Stat. 638, 645), authorized and approved the construction of said projects.

The Army Engineers have considered, and the Congress has enacted legislation on the theory, that the Grand River in Oklahoma is such a stream as Congress has control over under the Commerce Clause of the Constitution, and the Federal Power Commission—the administrative agency set up by Congress to determine whether any particular stream

sought to be utilized for power purposes is such a stream—has determined in an appropriate proceeding that the Grand River is such a stream and has issued to the petitioner, on July 26, 1939, effective January 1, 1939, a license, granting the petitioner the exclusive right to construct, maintain, and operate its hydroelectric project at the Pensacola location on Grand River for a period of fifty (50) years.

The right of the respondent to have the adaptability of its lands as a dam site for a hydroelectric project considered in fixing just compensation for their taking depends upon whether respondent had the right on the date of taking to utilize the waters of the river and said lands for that purpose. Such right depends upon the applicability of the Federal Power Act to the Grand River. In order for respondent's State permit to have any force and effect, with respect to the Grand River, it is necessary for the respondent to file with the Federal Power Commission its Declaration of Intention to construct its proposed project and to obtain from the Commission a determination that its proposed project would not affect the interests of interstate commerce. If, on the other hand, the Commission should find on its investigation of the Declaration of Intention that the interests of interstate commerce would be affected, it would be necessary for the respondent to make application to the Commission for a license and to receive from the Commission the license applied for in order to acquire any right to utilize the waters of the river and its dam site lands for such a project.

This Court will review the evidence which is incorporated in the record to determine for itself, independently of the findings of the State Court, the facts on which the Federal question involved depends. *United States v. Pink*, 315 U. S. 203, 86 L. Ed. 796; *Great Northern Railway Co. v. Washington*, 300 U. S. 154, 81 L. Ed. 573; *Norris v. Alabama*, 294

U. S. 587, 79 L. Ed. 1074; *Ancient Egyptian Arabic Order v. Michaux*, 279 U. S. 737, 73 L. Ed. 931; *Northern Pacific Railway Co. v. North Dakota*, 236 U. S. 585, 59 L. Ed. 735; *Kansas City Southern Railway Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556; *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 56 L. Ed. 1074.

It is now settled by decisions of the Supreme Court of the United States that Congress has jurisdiction under the Commerce Clause of the Federal Constitution over non-navigable waters which affect the navigable waters of the United States for the purpose of protecting and improving the navigable capacity of such navigable waters. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. Ed. 1136; *Sanitary District of Chicago v. United States*, 266 U. S. 405, 69 L. Ed. 352; *Wisconsin v. Illinois*, 278 U. S. 367, 73 L. Ed. 423; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. Ed. 243; *Oklahoma, ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 85 L. Ed. 1487; *First Iowa Hydro-Electric Corporation v. Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143.

Inferior Federal courts, following these decisions of the Supreme Court, have held that the jurisdiction of the Congress under the Commerce Clause and the jurisdiction of the Federal Power Commission under the Federal Power Act extends to non-navigable tributaries of navigable waters of the United States. *Grand River Dam Authority v. Going*, 29 F. Supp. 316; *Georgia Power Co. v. Federal Power Commission*, 152 F. (2d) 908; *United States v. Appalachian Electric Power Co.*, 107 F. (2d) 769, 795, and dissenting opinion of Judge Parker, 798.

It has been held by the United States Circuit Court of Appeals in three different circuits that the Federal Power Act applies to projects located in streams over which Con-

gress has jurisdiction under the Commerce Clause which were constructed under authority of State laws before the Federal Power Act was enacted, and that such projects can not be maintained or operated without a license from the Federal Power Commission. *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. (2d) 743 (certiorari denied June 18, 1945, 89 L. Ed. 1996); *Niagara Falls Power Co. v. Federal Power Commission*, 137 F. (2d) 787 (certiorari denied November 22, 1943, 88 L. Ed. 477, rehearing denied December 6, 1943, 88 L. Ed. 478; *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F. (2d) 155 (certiorari denied February 16, 1942, 86 L. Ed. 1205).

It is indisputable under the record in this case that Congress has assumed and preempted jurisdiction over the Grand River through the passage of the Federal Water Power Act of June 10, 1920, as amended by the Federal Power Act of August 26, 1935, enacted under its authority to regulate interstate commerce; that no riparian owner could acquire the right to utilize the waters of the river or lands riparian thereon for the production of electric power and energy without complying with the provisions of the Federal Power Act. The respondent never complied with the provisions of said Act or acquired under Federal law such right of use. On the other hand, the petitioner did comply with the provisions of the Federal Power Act and obtained from the Commission a license to construct, maintain, and operate its project at the Pensacola location on Grand River, effective January 1, 1939. The date of taking was January 19, 1940. At that time, the respondent could not possibly have acquired such right of use because the petitioner had been granted by the Federal Power Commission the exclusive right to build and operate its project at the Pensacola location. The respondent not only had not

and could not acquire such right of use, but was prohibited by the Federal Power Act from making such use of its lands and the waters of the river. Respondent's claim to such right of use by virtue of its State permit fades and disappears in the face of this prohibition.

Adaptability for Dam Site Use Can Not Be Considered in Fixing Just Compensation

Without a lawful right to utilize the waters of the river and the lands riparian thereon for the production of electric power and energy, the respondent was not entitled to have the adaptability of its lands as a dam site for such use considered in fixing just compensation for their taking. *Grand-Hydro v. Grand River Dam Authority*, 192 Okla. 693, 139 P. (2d) 798; *Lawton-Rapid Transit Railroad Co. v. City of Lawton*, 31 Okla. 458, 122 Pac. 212; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. Ed. 1063; *Olson v. United States*, 67 F. (2d) 24; *Continental Land Co. v. United States*, 88 F. (2d) 104 (certiorari denied October 11, 1937, 82 L. Ed. 552); *United States v. Boston C. C. & N. Y. Canal Co.*, 271 F. 877; *Central Pacific Railroad Co. v. Pearson*, 35 Cal. 247.

Section 27—Federal Power Act

Section 27 of the Federal Power Act, 41 Stat. 1077 (16 U. S. C. A. 821) provides:

“That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”

The term “other uses” does not include the generation of electric power and energy. This Court has definitely so

held in the case of *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143, in which the Court cites and approves *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606. This Section recognizes and preserves the continued operation of the local laws of the respective states relating to the control, appropriation, use and distribution of water used for irrigation or municipal purposes, and uses of a similar nature, but does not for power purposes, and respects and preserves any vested right acquired thereunder for irrigation, municipal, or other similar uses, but not for power purposes.

In *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. (2d) 743, decided February 26, 1945, the Wisconsin Public Service Corp. had constructed a dam and power project on the Wisconsin River, under and in accordance with the laws of the State of Wisconsin before the Federal Power Act was enacted and relied upon Section 27 of the Federal Power Act to protect its project from control of the Federal Power Commission under the Federal Power Act. The court held that the Federal Power Act applied and the Wisconsin Public Service Corporation was required to comply with the provisions of the Federal Power Act and accept a license from the Federal Power Commission in order to lawfully continue the operation of its project. The court cited in support of its holding the case of *Pennsylvania Water Power Co. v. Federal Power Commission*, 123 F. (2d) 155, and *Niagara Falls Power Co. v. Federal Power Commission*, 137 F. (2d) 787.

The decision of the Supreme Court in the *First Iowa Hydro-Electric Cooperative* case, *supra*, was followed by the Supreme Court of Vermont in the case of *Bellows Falls Hydroelectric Corporation*, 47 Atl. (2d) 409. In that case the Public Service Commission of Vermont, under authority of a State statute, had granted to the Bellows Falls Hydroelectric Corporation authority to redevelop its water power

facilities on the Connecticut River by the erection of a dam in that stream. An appeal was taken from the order of the Commission to the Supreme Court of the State where the order of the Commission was reversed on the ground that the Commission did not have the right to exercise the jurisdiction conferred upon it by the Vermont statute for the reason that the Federal Power Commission had exclusive jurisdiction over the Connecticut River under the Federal Power Act.

In the *Appalachian Electric Power Company* case, the Supreme Court held that the Federal Power Commission could require a Federal license from an applicant who had complied fully with the local laws of West Virginia under which it held a completely valid license to construct and operate its project on the New River, and in the *First Iowa Hydro-Electric Cooperative* case the Supreme Court held that the Federal Power Commission had jurisdiction to issue a Federal license without the applicant's compliance with the local laws of the State of Iowa, and without obtaining a State license thereunder to construct and operate a project on Cedar River.

Section 10(c)—Federal Power Act

It is provided under Section 10(c) of the Federal Power Act (16 U. S. C. A. 803), and Article 17 of the petitioner's Federal License, that the Licensee "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation" of the licensed project. This provision of the Federal Power Act and of the petitioner's License does not create a *new liability not otherwise existing*. It merely requires the assumption by the Licensee of such liability as may legally arise independently of the provision. *Alabama Power Co. v. Smith*, 229 Ala. 105, 155 So. 601, 604; *Louisville Hydroelectric Co. v. Coburn*, 270 Ky. 631, 110 S. W. (2d) 445, 448; *Humpich's*

Trustees v. Louisville Gas and Electric Co., 269 Ky. 538, 108 S. W. (2d) 509, 511, and *Corrigan Transit Co. v. Sanitary District of Chicago*, 137 F. 851.

The liability of the petitioner legally arising independently of this provision is to pay just compensation. But what is just compensation, and what are the damages which the petitioner is required to pay? What is the measure of compensation or damages? The measure of compensation in a condemnation proceeding is a substantive right. *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 336, 147 A. L. R. 55. The petitioner is obligated to pay Grand-Hydro for the lands taken the fair market value thereof, which includes any special value inherent in said lands, because of their adaptability or suitability for any particular use to which the respondent could lawfully apply said lands. The respondent did not have the right under Federal law to use its lands for a dam site for a hydroelectric project, but was by Federal law prohibited from using them for such purpose, and it is not entitled to compensation based upon a right of use which never existed in fact and which it could not on the date of taking lawfully acquire. The measure of compensation in this case is a Federal question because it depends on a right of use controlled by paramount Federal law.

It is therefore respectfully submitted that the writ of certiorari applied for should be granted by this Court and thereafter the decision of the Supreme Court of Oklahoma reviewed and reversed.

QUINCE B. BOYDSTUN,

Vinita, Oklahoma;

DELMAS E. MARTIN,

Tulsa, Oklahoma;

ROBERT LEANDER DAVIDSON,

Tulsa, Oklahoma,

Attorneys for Petitioner.

APPENDIX "A"**IN THE SUPREME COURT OF THE STATE OF
OKLAHOMA**

No. 30447

GRAND-HYDRO, a Corporation, Plaintiff in Error,

v.

**GRAND RIVER DAM AUTHORITY, a Corporation, Defendant in
Error****SYLLABUS**

In determining the market value of real property taken by power of eminent domain, it is not merely the value of the property for the use to which it has been employed by the owner that should be considered, but its adaptability to all purposes, present and prospective, to which it may reasonably be applied by the condemnee must be considered and taken into account in fixing such value.

Appeal From District Court of Mayes County**Hon. N. B. Johnson, Judge.**

Proceedings in condemnation by Grand River Dam Authority against Grand-Hydro, a corporation. From an alleged insufficient award of compensation, the condemnee appeals.

REVERSED AND REMANDED WITH DIRECTIONS

Harve N. Langley, R. A. Wilkerson, both of Pryor, Oklahoma; S. F. Fowler, Knoxville, Tenn.; R. D. Hudson, Tulsa, Oklahoma, for Plaintiff in Error.

Edw. P. Marshall, Tulsa, Oklahoma; J. B. Dudley, Oklahoma City; R. L. Davidson, Tulsa, for Defendant in Error.

GIBSON, V.C.J.:

This is an appeal by the condemnee from the judgment of the district court of Mayes County rendered on a verdict in condemnation proceedings.

The proceedings were instituted by Grand River Dam Authority, a corporate instrumentality of the State, against Grand-Hydro, a corporation; to condemn some 1400 acres of land located in the Grand River valley. The commissioners appointed by the court awarded Grand-Hydro the sum of \$281,802.74, whereupon said corporation filed its objections thereto and demanded a jury trial. Thereafter said Authority also filed its objections and demanded a jury. The trial resulted in a verdict fixing the damages at \$136,250, and Grand-Hydro appeals from the ensuring judgment.

Grand River Dam Authority was created by S. B. No. 395, S. L. 1935 (now 82 O. S. 1941, 861-881, as later amended), and was the corporate name applied to a conservation and reclamation district thereby created, and comprising certain designated counties, including the county of Mayes. Said Authority, as "a governmental agency, body politic and corporate," was endowed with the power, among numerous others, to develop water power and electric energy within the boundaries of said district and on the Grand River, including the power of eminent domain.

Grand-Hydro was incorporated in 1929 under the laws of this State for the purpose of developing and selling hydro-electric energy and water for irrigation on Grand River. Pursuant to its corporate powers it acquired title to the lands here involved and which include the land selected by the Authority as a dam site for the erection of its power project. In 1931 said corporation applied for and obtained from the State Conservation Commission a license and permit to appropriate the waters of Grand River for beneficial use including the construction of a dam and the development of hydro-electric power for sale, pursuant to chapter 40, S. L. 1910 (82 O. S. 1941, 1-83), and chapter 70, S. L. 1927 (82 O. S. 1941, 451-510 as subsequently amended).

The Authority claims the right to use the stream in the development of electric power, etc., under article 4, chapter 70, S. L. 1935, as amended by articles 1 and 2, chapter 70, S. L. 1937 (82 O. S. 1941, 861-881).

The principal controversy on appeal involves the action of the trial court in striking the testimony of certain expert witnesses relating to the value of a portion of the premises, a tract of 417 acres, from the standpoint of its special adapt-

ability to dam-cite purposes. The trial court withdrew the evidence from the jury on the ground that the adaptability of the tract to such purpose was not a proper element for consideration in estimating the market value thereof.

Grand Hydro says the trial court erred in striking the testimony, and erred in its admonition to the jury not to consider the same, and erred in refusing certain requested instructions pertaining to the right to have such testimony considered. And it is insisted that this action of the court resulted in depriving the condemnee of its property without due process of law, and without just compensation.

The measure of compensation in such case is the fair market or cash value of the land condemned. *City of Tulsa v. Creekmore*, 167 Okla. 298, 29 Pac. (2d) 101. In that case the court, speaking of the elements to be considered in determining market value, said: "It is the market value that is the test and not its value for some particular use to which it might be subjected, although its adaptability to this particular use may be considered as one of the factors in ascertaining the market value when they enter into and affect the cash market value of the property. *Revell v. City of Muskogee*, 36 Okla. 529, 129 Pac. 833; *Public Service Co. v. Leatherbee (III)*, 143 N. E. 97." And in the syllabus by the court the fair cash or market value of land taken in eminent domain is defined as follows:

"By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied."

With reference to the question of adaptability or availability for a particular use as an element in determining market value, the court held as follows:

"In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which

it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test."

The above case contains a reasonably clear statement of the law obtaining in this State and which must be applied here. The condemnée is ordinarily entitled to compensation measured not only by the value of the land for the use to which he has applied it, but the value thereof for all possible purposes, present and prospective, to which he or his ordinary grantee might legally apply the same.

However, it is urged that the law announced in the above case does not entirely cover the situation here presented. It is said that the rule may apply generally to all uses to which the condemnée or his grantee at a free sale may lawfully employ the land, but does not apply in those instances where, as here, the condemnée or his ordinary grantee would have no legal right to use the land for the purpose for which the condemnée now urges as an element of compensation.

We agree that the rule for the measure of compensation as announced in the *Creekmore* case applies only to those adaptable uses to which the condemnée or his ordinary grantee may lawfully place the land. *United States v. Boston, O. C. & N. Y. Canal Co.*, 271 Fed. 877. In the opinion in that case the court said: "We are of the opinion that, in ascertaining the market value of property taken in a condemnation proceeding the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only party who can use the property for that purpose. If, however, the property has a special utility or availability, not only to the taker, but to other parties who could use the property for the particular purposes intended by the taker, then this utility or availability may be shown." See also *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, wherein it was said that the question in cases of this character "is what has the owner lost, and not what has the taker gained."

The Authority urges that as a governmental instrumen-

tality of the State it had exclusive authority to use the waters of Grand River for commercial purposes, and that Grand-Hydro possessed neither that right nor the right to construct a dam and to impound the waters for any purpose, and could not sell to any one possessing those rights other than to the Authority, and was therefore not entitled to urge the adaptability of the land in that respect as an element of compensation.

The above contention forms the basis of the principal question in this case.

The owner of land may use the water of a natural stream flowing across the same, but he may not prevent the natural flow thereof. 60 O. S. 1941, 60.

The statute, *supra*, creating the Grand River Dam Authority and defining its functions purports to be an express appropriation by the State of the waters in Grand River to be applied to the uses therein stated, and to place in its said agency exclusive authority to develop the stream in the manner therein provided. The State may control the flow of all non-navigable streams such as the Grand River. And it may reserve to itself or grant to private parties the right to utilize such streams for power and other purposes. 67 C. J. 683, sec. 10.

As a basis for its argument that Grand-Hydro merely owned the land and was without right to use the waters for developing power, the Authority says that Grand-Hydro's purported license and permit issued by the Conservation Commission was void, or at least had expired by its own terms, and was no longer in force and effect.

First, it was urged that said permit was void for the reason that no judicial decree by any court had been entered determining all rights of all parties along the stream to use the waters thereof as provided by 82 O. S. 1941, 12, 13, 14 (secs. 3640, 3641, 3642, R. L. 1910), and which decree, says the Authority, was a condition precedent to the authority of the commission to issue the permit. (*Owens v. Snider*, 52 Okla. 772, 153 Pac. 833.)

Under 82 O. S. 1941 11 (sec. 3639, R. L. 1910) the state engineer was required to make hydrographic surveys of stream systems and to deliver the same to the Attorney General whose duty it was to enter suit in court to obtain

judicial determination of all rights of parties within the stream system to the use of the waters of the stream. Under 82 O. S. 1941, 21 (sec. 3645, R. L. 1910) the state engineer was authorized to issue permits to applicants to appropriate the water "for beneficial use." At the time Grand-Hydro received its permit to utilize the water for power purposes, August 29, 1931, the Conservation Commission had succeeded to all the powers of the state engineer, with many more powers added. Ch. 70 S. L. 1927 (now contained, as subsequently amended, in 82 O. S. 1941, 451-510).

82 O. S. 1941, 12, *supra*, is a part of an Act passed in 1905 relating to beneficial use of the waters in streams, and particularly to its use for irrigation. The Act now appears in 82 O. S. 1941, 1-83. A similar Act was passed in 1924 pertaining to drainage and irrigation (ch. 139, S. L. 1923-24). Section 3, of the latter Act authorized the district courts, by certain procedure, to organize conservancy districts for the prevention of floods, for irrigation and other designated purposes. Water power was not mentioned therein. According to the title of the Act, the whole purpose was State control of drainage and irrigation. The latter Act was amended in certain particulars by Chapter 148, S. L. 1925. In 1927 the Legislature passed a comprehensive Act pertaining to drainage and irrigation and making specific provision for the development of water power and the granting of permits for the development of such power. Ch. 70, S. L. 1927. This Act created the Conservation Commission and vested it with the authority theretofore held by the state engineer, and additional powers. The Act does not purport to alter former acts to any appreciable degree with reference to organization of drainage and irrigation districts, so far as this case is concerned. But it gives to said commission specific authority to grant permits for water power development. That authority is found in paragraph (7), section 3, of the Act, and reads as follows:

"To supervise, conserve and develop the water power of the State of Oklahoma, granting permission for the development of such power, making such reasonable

rules and regulations governing the development and operation and distribution of such power except as may be otherwise provided by law, and to take such steps as may be necessary to encourage the development of water power within said State, and to undertake by, and on behalf of the State the development of water power when private development may be inadequate or unsatisfactory on such terms as may be hereinafter provided by the Legislature, and to exercise such further powers and duties as may be directed hereafter by the Legislature of this State."

That section is now 82 O. S. 1941, 482. Section 16 of the 1927 Act repealed all Acts and parts of Acts in conflict therewith.

Under the Act of 1905 (82 O. S. 1941, 1-83) a court decree determining water rights for irrigation was a condition precedent to the issuance of a permit to irrigate. *Owens v. Snider*, supra. But we fail to find any statute enacted prior to 1927 giving the courts any specific authority to determine water rights as a preliminary requirement to a permit to develop water power. Paragraph (7), section 3, above, gives full power to the commission to grant permits for water power, free and independent of other agencies, and without regard to the boundary lines of improvement districts. This law was in full force and effect at the time Grand-Hydro procured its permit. The permit was therefore valid in its inception.

The Authority says further that even if the permit be considered as valid at the time of issuance, it nevertheless became invalid prior to the condemnation proceedings by reason of the fact that it had expired by its own terms, and as a result thereof Grand-Hydro occupied the same position with reference to condemnation as that of the ordinary landowners along the river.

The permit was issued to Grand-Hydro on August 29, 1931. It provided that the works, the dam, etc., be completed within four years from date, and one-fifth of the works within one-half that period, and to appropriate the waters to beneficial use within four years after the period for

completion of the works. There was no provision in the permit declaring a forfeiture on failure to comply.

The Act creating the Authority came into full force and effect on July 29, 1935, or one month before the expiration of four years from the date the license was issued. Assuming that one-fifth of the works had not been completed, Grand-Hydro still had one month and four years under its license to commence appropriating the waters to beneficial use. There was nothing in the license to indicate that it should terminate within two years, four years or eight years. There was no term fixed. The most that can be said of the time periods mentioned is that they were inserted in the license as a means of measuring the good faith of the licensee. The purpose of the license was to provide for a public service within eight years. It was nothing less than a franchise for that purpose, and it had not been abandoned, nor had it expired by its own limitation. And it had not been terminated by judicial decree. As said in 26 C. J. 1040, sec. 98, "The grant of a franchise is a grant in perpetuity unless limited in duration by the grant itself, or as a consequence of some limitation imposed by general law, or by a limitation on the power of the authority making the grant." And it is further said: "The ownership of a franchise will not be divested by mere implication." 26 C. J. 1042, sec. 107.

We do not say that the State may not have cancelled the license by appropriate legal action on the ground of abandonment or of bad faith if such were the facts. This was not done, however, and so far as this case is concerned the license or permit remained in full force until the parties agreed to terminate it as hereinafter mentioned.

The State may engage in any occupation or business for public purposes such as supplying hydro-electric power. Sec. 31, art. 2, Const. And it exercised that power when the Legislature created the Grand River Dam Authority.

Prior to the creation of said Authority, and in February 1934, the City of Tulsa filed an action in the district court of Mayes county pursuant to 82 O. S. 1941, 1-83, *supra*, against Grand-Hydro and others, seeking an adjudication of the water rights of the parties to the waters of Spavinaw

Creek and to establish the city's prior right thereto, and a like adjudication as to the waters of the Grand River stream system and the priority right thereto of Grand-Hydro over other parties to said action. The Authority was created while that action was pending, and on application of the City of Tulsa and Grand-Hydro the Authority was made a party.

Thereupon the Authority filed its answer and cross-petition seeking an adjudication of the rights of all parties to appropriate the waters of Grand River and its tributaries. After the Authority was made a party to said action, and prior to filing its answer and cross-petition aforesaid, Grand-Hydro and the Authority, as parties to the litigation, entered into an agreement in writing whereby Grand-Hydro, claiming under its permit and the work done pursuant thereto the prior right to appropriate the waters of said river to the uses aforesaid, granted and assigned to the Authority "all of its rights, claims, interests and privileges in, to or concerning the waters of the Grand River and its tributaries, or the appropriation thereof arising out of or by virtue of said approved application and the work done under authority thereof, or otherwise, including, but without limitation, all of its rights of priority in the appropriation of the waters of said River and its tributaries existing by virtue of its having filed with the proper authorities the first application to appropriate such waters to a beneficial use;". But said agreement also contained the following provision:

"It is understood, however, that this assignment and conveyance shall not in any way affect or impair the title of Grand-Hydro, to any lands owned by it or any interests therein, and if any lands or interests therein owned by the said Grand-Hydro are acquired by the Grand River Dam Authority by purchase or condemnation, the value thereof or damage thereto, shall be ascertained and determined as though this assignment and conveyance had never been made."

The Authority then filed its answer and cross petition in said action as above related, setting up the permit of

Grand-Hydro and alleging that by virtue of the assignment above mentioned the Authority had become possessed of all the rights, claims, interest and privileges in and to or concerning the waters of Grand River theretofore held by Grand-Hydro by virtue of its permit issued by the Conservation Commission. And the trial court held in that case that the Authority had succeeded by virtue of said assignment to all rights Grand-Hydro may have held under its permit to appropriate the waters of the river. And the court rendered judgment giving the Authority prior right to control and appropriate said waters, and that Grand-Hydro had no right therein. That judgment became final.

Counsel for the Authority take the position that the judgment in the former case foreclosed any and all claims Grand-Hydro may have had to compensation other than for the value of the land for ordinary purposes, not including any value growing out of its special adaptability for damsite purposes.

But, by the agreement aforesaid, Grand-Hydro and the Authority specifically excluded from the issues in that case any question pertaining to the rights and claims of Grand-Hydro growing out of its permit, except in so far as the agreement released or renounced or transferred those rights to the Authority. The question of compensation for every claim, whether by purchase or by condemnation, was specifically reserved by that portion of the agreement quoted above.

The court's decree in the City of Tulsa case contains the following:

“ * * * Thereupon, the court . . . finds and adjudges:

“2. That on the 14th day of July, 1931, the defendant, Grand-Hydro, a domestic corporation, filed with the Conservation Commission of Oklahoma its application in due form for a permit to appropriate 4,000 cubic feet per second of the flow of Grand River for the purpose of generating electric energy and power; that the Commission fixed a day certain for the hearing of said application, and directed that notice of said hearing be given as provided by law; that said notice was duly given, and on the 29th day of August, 1931, the said Commission issued to the Grand-Hydro a

permit to appropriate to a beneficial use (the generation of electric energy and power) 4,000 cubic feet per second of the flow of Grand River; that under the authority of said approved application, Grand-Hydro proceeded with diligence to acquire one or more dam sites for the purpose of constructing a dam to impound the waters of Grand River for use in the generation of electric power and energy, and in making extensive engineering investigations and surveys, and in the acquisition of lands in the basin area of the reservoir which would be inundated by the impounded waters, but the court finds and adjudges that the Grand-Hydro did not construct any works or facilities through which to utilize the waters of said river for the purpose of generating electric energy or for any other beneficial use, and did not actually apply and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to apply or appropriate any of the waters of said river to any beneficial use, but that if Grand-Hydro acquired any rights under its approved application, it has transferred and conveyed the same to the Grand River Dam Authority by virtue of its assignment of January 10, 1938."

It is true that the Authority alleged in that case that Grand-Hydro's permit was issued prematurely by the commission for the reason that no adjudication of priority rights of interested parties had theretofore been made by the proper court, and was therefore invalid. But, as we have said above, such adjudication of priority rights was not essential to a permit to develop hydro-electric power.

The Authority also alleged:

"This answering defendant further alleges that the defendant, Grand-Hydro, an Oklahoma corporation, chartered and organized for the purpose of engaging in the business of generating hydro-electric power and energy and the distribution thereof in Oklahoma, filed in the office of the Conservation Commission of the State of Oklahoma (now the Planning & Resources Board of the State of Oklahoma) on July 14, 1931, its application in due form to construct on Grand River in Oklahoma, a dam and hydro-electric power

plant and to appropriate all of the waters of Grand River for the beneficial purpose of generating hydro-electric power and energy; that pursuant to said application, due and proper hydrographic survey was made and notice was issued and given in the manner prescribed by statute, and on the 29th day of August 1931, upon due consideration of said application, the hydrographic survey and the evidence introduced; the said Conservation Commission approved said application and endorsed its approval on the back thereof; that on the 10th day of May 1934, the said Grand-Hydro filed in this cause its answer and cross-petition setting up these facts, and claimed a prior right to appropriate the waters of Grand River to a beneficial use by virtue of having filed the first application, under the statutes of Oklahoma; that on the 10th day of January 1938, the said defendant Grand-Hydro, executed and delivered to this answering defendant all of its rights, claims, interests and privileges in, to, or concerning the waters of Grand River and its tributaries or the appropriation thereof arising out of or by virtue of said approved application and the work done under authority thereof, including, but without limitation, all of its right of priority in the appropriation of the waters of said river and its tributaries, existing by virtue of its having filed with the proper authorities the first application to appropriate such waters to a beneficial use. A true and correct copy of said assignment is attached hereto and made a part hereof and marked for identification, 'GRDA Exhibit No. 1.'

"This answering defendant further alleges that the Conservation Commission of the State of Oklahoma, on the 29th day of August 1931, in approving the application of Grand-Hydro for the appropriation of 4,000 cubic feet per second of the average annual flow of Grand River, for the purpose of generating electric energy, adjudged and declared that 'Grand-Hydro is prior in time and is the first applicant and appropriator of the waters of Grand River for beneficial purposes'; that under the authority of said approved application, the Grand-Hydro made extensive engineering investigations and surveys on said river, including churn and core drilling, for the purposes of testing dam site foundations, and that the Conservation Commission of the State

of Oklahoma on the hearing of the Grand-Hydro application, found and adjudged that the Grand-Hydro was financially able to construct the work proposed in its application and had acted diligently and in good faith, and that there had been no prior appropriation of the waters of said river to any beneficial use, and that the application of Grand-Hydro was prior in point of time to all others; and this answering defendant further alleges that by virtue of said assignment from Grand-Hydro to the Grand River Dam Authority, of January 10, 1938, the Grand River Dam Authority is now possessed with all the rights, claims, interests and privileges of Grand-Hydro in and to or concerning the waters of Grand River and its tributaries and the appropriation thereof arising out of or by virtue of said approved application and the work done under authority thereof, including, but without limitation, all of its rights of priority in the appropriation of the waters of said river and its tributaries, existing by virtue of it having filed with the proper authorities the first application to appropriate such waters to a beneficial use."

It is apparent from a reading of the Grand River Dam Authority's answer and cross-petition and the court's decree in the City of Tulsa case that the Authority sought and obtained an adjudication that it was the holder and owner, by assignment, of all the rights and privileges Grand-Hydro had obtained under its permit.

The Authority was bound by the agreement which was entered into in furtherance of the settlement, or of defining issues involved in litigation. For, as said in *Grand River Dam Authority v. Grand-Hydro*, 188 Okla. 506, 111 Pac. (2d) 488, "its transactions are akin to those of private enterprises, and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." And further, "The Authority cannot exercise the powers as conferred upon it, avail itself of judicial process and, in the absence of legislation relieving it, escape the usual incidents of litigation that fall upon private litigants." *Id.*

When the present proceedings in condemnation were com-

menced Grand-Hydro stood in the same position with reference to compensation as it occupied at the time the former action was filed. At that time it held a valid and subsisting franchise from the State to erect dams for the purpose of generating hydro-electric power for public consumption. It released that right to the State by the aforesaid agreement, but reserved the right to full compensation for all privileges it was releasing. Those privileges were compensable as uses to which its lands were reasonably adaptable. A portion of those lands was adaptable to dam site purposes for the generation of hydro-electric power.

We are aware of but one statute touching upon the measure of damages where the State takes over the projects of licensees such as the Grand-Hydro. That is the Act of 1927, *supra*, section 12 thereof (82 O. S. 1941, 484). That section provides that the Legislature by enactment may revoke a license such as that held by Grand-Hydro and take over and operate the project after reimbursing the licensee as therein provided. But no such action may be taken by the Legislature until at least ten years after completion of the works. Here, there had been no such competition, and therefore the statute, with reference to reimbursement or compensation, does not apply.

Grand-Hydro pursued the proper course for determining the market value of the land. It produced witnesses qualified to give their opinion as to that value from the standpoint of the adaptability of the land to every use to which Grand-Hydro might reasonably employ the same. Among those uses was that of dam construction for the development of hydro-electric power for public use. Grand-Hydro produced qualified witnesses who gave their opinion as to the market value of the land for the latter purpose, but their testimony was withdrawn by the court and the jury admonished not to consider the same. The ground assigned for such procedure was that the adaptability of the land to dam site purposes was not an element of market value. In this the court erred.

The judgment is reversed and the cause remanded with directions to set aside the verdict and to allow the parties thereupon to renew their motions for jury trial, and to take

such other action as will conform to the views herein expressed.

Corn, C. M., and Osborn, Bayless, Welch, and Davidson, J.J., concur; Arnold, J., concurs in conclusion; Riley and Hurst, J.J., dissent.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32,399

GRAND RIVER DAM AUTHORITY, a Public Corporation,
Plaintiff in Error,

v.

GRAND-HYDRO, a Private Corporation, *Defendant in Error.*

SYLLABUS

1. Ordinarily, all questions open to dispute and either expressly or by necessary implication decided on appeal to this court will not be open for review on the second appeal, but such decision becomes the settled law of the case as to all such questions, and is not subject to re-examination.

2. The passage of the act creating the Grand River Dam Authority did not destroy the dam site value of land condemned, if properly an element to be considered in fixing the amount which condemnee is entitled to recover. Art. 4, Chapt. 7, S. L. 1935, 82 O. S. 1941, Secs. 861-881.

3. That condemnee had not applied for, nor secured, license from Federal Power Commission for construction of dam on non-navigable stream was not material in fixing value of land taken for dam site.

4. In jury trial, argument of counsel should be limited to those questions submitted to jury and should not extend to questions of law determinable by the court.

5. Where, in a condemnation proceeding, the jury fixes the value of property taken as of the date of taking, interest

from such date is allowable on balance not paid into court at that time by condemnor.

APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY

Hon. N. B. Johnson, Judge

Affirmed

Q. B. Boydstun, R. L. Davidson, Tulsa, Okla., for Plaintiff in Error.

Harve N. Langley, R. A. Wilkerson, Pryor, Okla.; S. F. Fowler, Knoxville, Tenn.; R. D. Hudson, Tulsa, Okla., for Defendant in Error.

J. Edward Williams, Roger P. Marquis, U. S. Dept. of Justice, Amicus curiae.

Mac Q. Williamson, Attorney General of Okla., Fred Hansen, Attorney General, Amicus curiae.

DAVISON, V.C.J.:

This is an appeal from a judgment rendered upon a jury verdict in an action in condemnation brought by the Grand River Dam Authority, herein referred to as the Authority, as plaintiff, against Grand-Hydro, as defendant.

After commissioners were appointed and had fixed the value of defendant's property, both parties demanded a jury trial, resulting in a verdict for defendant of \$136,250. (On appeal to this court the cause was reversed and remanded. *Grand-Hydro v. Grand River Dam Authority*, 192 Okla. 693, 139 P. 2d 798.)

The case was retried and judgment rendered upon the verdict of the jury from which plaintiff brings the cause here on appeal. Briefs amicus curiae have been filed by the State of Oklahoma and by the United States.

There is little dispute about the facts. The Grand-Hydro is a private corporation organized in 1929 and incorporated for the purpose of generating and distributing electric power. It acquired title to numerous tracts of land along the Grand River, including that involved in this litigation which consists of some 1,400 acres. Included in this acreage is one 417 acre tract known as the Pensacola site, which is the site of the dam later built by the Authority.

On August 29, 1931, after a proper application therefor was filed, the Conservation Commission of Oklahoma issued to Grand-Hydro, a permit to appropriate to a beneficial use 4,000 cubic feet per second of the flow of Grand River and to construct one fifty foot storage and power dam and one 14 foot equalizing dam, pursuant to which, extensive engineering investigations and surveys were made by the Grand-Hydro. As pointed out in our former opinion, this permit was in effect at the time of its assignment to the Authority.

In February, 1934, the City of Tulsa, after having obtained a permit to appropriate the waters of Spavinaw Creek, a tributary of Grand River, filed suit in the District Court of Mayes County to adjudicate the appropriated and unappropriated waters of both streams. In that suit the Grand-Hydro was made defendant along with several cities and towns.

The State Legislature in 1935 created the Grand River Dam Authority as a governmental corporate agency, to develop and sell water power and electric energy in the Grand River Basin, and endowed it with the power of eminent domain.

After being made a party to the City of Tulsa suit and before filing answer, the Authority acquired on January 10, 1938, by assignment and deed, all of the title and interest of the Grand-Hydro in a 45 acre tract of land and in the permit and license to appropriate the waters of Grand River to a beneficial use. The Authority then, on January 18, 1938, filed its answer and cross petition, alleging among other things the assignment and the ownership by the Authority of all the interest of Grand-Hydro in the permit and license. About a month later judgment was rendered adjudging that the several municipalities had a prior right to divert and appropriate for municipal purposes very small amounts of the flow of Grand River and that the Authority had a prior right to the remainder of said flow.

In March, 1938, Grand-Hydro conveyed another 10 acres to the Authority and in July conveyed to it the right of entry on all lands at the Pensacola dam site and south thereof. The conveyances of the land were made on condi-

tion that the consideration would later be determined by agreement or condemnation and the assignment was on the condition provided for therein:

"It is understood, however, that this assignment and conveyance shall not, in any way, affect or impair the title of Grand-Hydro to any lands owned by it, or any interests therein, and if any lands or interest therein owned by the said Grand-Hydro, are acquired by the Grand River Dam Authority by purchase or condemnation, the value thereof or damage thereto shall be ascertained and determined as though this assignment and conveyance had never been made."

The parties being unable to agree on the value of the property, the Authority filed this action in condemnation February 17, 1939. It was stipulated by the parties that the taking date was January 19, 1940.

In July, 1939, after proper application by the Authority and after a finding that the construction proposed would affect interstate commerce because of its effect on the Arkansas River, the Federal Power Commission issued a license to the Authority to construct, maintain and operate the dam which it later built. The spillway was built on the 45 acre tract acquired by deed and the dam was built on adjacent land still owned by Grand-Hydro but covered by the right of entry. Grand-Hydro had no such Federal license nor had it taken any steps toward procuring one.

In the second trial the witnesses, on behalf of the Grand-Hydro testified that the 417 acre tract had a value of \$750,000 to \$1,000,000 for dam site purpose and the balance of the land had a value of \$78,375 to \$83,600. The Authority introduced no testimony as to the value of the land for dam site purposes but their witnesses testified the entire 1,400 acres had a value of \$34,500 to \$56,656.50.

The numerous assignments of error urged by appellant will be considered in the order presented, first and foremost being whether or not the former opinion of this court constitutes the law of the case on this appeal. The conclusions therein expressed were arrived at after extensive arguments by counsel, the filing of various petitions for rehearing and

detailed consideration of every question presented. Many cases are cited by each party stating the rule of law:

"* * * All questions open to dispute and either expressly or by necessary implication decided on appeal to this court will not be open for review on the second appeal, but such decision becomes the settled law of the case as to all such questions, and is not subject to re-examination." *St. Louis & S. F. Ry. v. Hardy*, 45 Okla. 423, 146 P. 38.

And the exceptions to the rule:

"* * * The Courts uniformly hold that an appellate court may review and reverse its former decision in the same case where it is satisfied that gross or manifest injustice has been done by its former decision, or where the mischief to be cured far outweighs any injury that may be done in the particular case by overruling a prior decision." *Wade v. Hope & Killingsworth*, 89 Okla. 64, 213 P. 549.

Although a few courts hold that there is no exception to the general rule, we have consistently held that, if the facts of the particular case warrant, the exception should apply. But, as heretofore stated, the opinion on the first appeal was rendered only after exhaustive study and is the law of this case on all questions therein decided.

On the first appeal we held that the permit of the Grand-Hydro was not invalid ab initio, nor had it expired by its own terms, nor had it been abandoned, nor did the City of Tulsa case so hold.

The doctrine of "the law of the case" is not controlling "where the facts and issues are different in a subsequent appeal from what they were in the former appeal." *M. K. & T. Ry. Co. v. Tulsa*, 113 Okla. 21, 238 P. 452 at 456. In this appeal the new or different facts and issues presented consist of the competency of the testimony, as presented in the last trial, of the expert witnesses as to the market value of the dam site; the submission of such testimony to the jury under proper instructions; the effect of Grand-Hydro's lack of a permit from the Federal Power Commission; the

trial court's refusal to allow counsel to argue to the jury that the condemned land had no dam site value because of such fact; and the allowance of interests.

When the very able argument of the plaintiff in error, on all points except that relating to interest, is summarized and condensed, it can be stated as one proposition: that, by reason of the legislative act creating the Authority, and the issuance of a permit to it by the Federal Power Commission, the value of the land as a dam site was for the special purpose of the taker, the only party who can use it for that purpose. Many authorities are cited to the effect that if the taker is the only one who can use the land for a particular purpose, its value therefor is not an element in fixing the market value. Paramount among the authorities cited are *Eichman v. The City of Oklahoma City*, 84 Okla. 20, 202 P. 184 and *United States v. Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877. In all of the cases relied upon, the taker, inherently, was the only one who could use the property for the specific purpose, usually a governmental function, or the condemnee did not have the power of eminent domain necessary to acquire all the lands needed to use the tract for such purpose.

In the case at bar the condemnor was, by legislative act, exclusively authorized to use the Grand River for hydro-electric power, but the use was in the nature of a business enterprise and the condemnee was also possessed of the power of eminent domain.

Appellant contends that the passage of the act creating the Authority was, in effect, a forfeiture of the Grand-Hydro permit and therefore it was not entitled to recover the dam site value of the lands condemned. If such was the intent of the legislature in passing the act, it was in violation of the Constitution, article 2, section 24. The state cannot, through its law making body, remove the principal value of private property and through its established agency, acquire the property by condemnation, basing the reimbursement to the owner on the reduced value. If it were otherwise it would be possible to circumvent the above section of our Constitution. The value of the right to appropriate water which constitutes one element in fixing the value of land as a dam site was discussed in our former opinion.

The parties themselves realized that the suitability of the land as a dam site was the principal element of value. Otherwise, there would have been no reason for the above quoted proviso in the assignment of the license and permit. This is further borne out by the stand taken by the Authority in the City of Tulsa case in which the Authority's answer and cross petitions set up the assignment as a basis of ownership of all of the Grand-Hydro's right to appropriate the river flow. The judgment in that case sustained that position.

The testimony of the expert witnesses as introduced was, therefore, competent to prove the dam site value of the property and was in accord with our opinion on the former appeal. To the same effect is the California case of Metropolitan Water Dist. of Southern California *v.* Adams, et al. (Cal.) 116 P. 2d 7, wherein there is an extensive discussion of many of the points herein involved and a collection of many authorities on the subject.

Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417 acre tract as a dam site, it could not thereby take private property without just compensation. Nor was the issuance of such license intended to have that effect because the plain provision requires the licensee to pay all damages to the property of others caused by the construction, operation and maintenance of the project. In addition, the Federal Power Commission based its authority to take jurisdiction upon a finding of fact that the construction and operation of the project "as proposed by the declarant will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary." The Commission would have no authority whatever if the dam site were used for the construction of such a dam that the navigability of the Arkansas River would not be affected.

The trial court, therefore, was correct in refusing to allow counsel to argue to the jury the proposition that the lands had no dam site value because of the provisions of the legislative act creating the Authority and the issuance to it of the license by the Federal Power Commission. The instructions to the jury fully cover all issues submitted and

are in harmony with our opinion herein and in the first appeal.

On January 19, 1940, the date of the taking, the Authority paid into court the amount found by the commissioners to be the value of the property; \$281,802.74. The jury fixed the value at \$800,000 and the judgment of the court allowed interest on \$518,179.26, the difference between these two amounts, from said date of taking. The question of interest in this type of case must be reserved by the court, as in *St. Louis, E. R. & W. R. Co., v. Oliver*, 17 Okla. 589, 87 P. 423, or it must be apparent that the jury omitted it, in order for the court to allow the same. *Blackwell, E. & S. W. R. Co. v. Bebout*, 19 Okla. 63, 91 P. 877. Herein, the trial court instructed the jury to fix the market value of the lands as of the date of taking. Therefore it was proper to allow interest from that date.

Finding no error, the judgment is affirmed.

Osbörn, Bayless, Welch, Gibson & Arnold, J.J., Concur;
Hurst, C. J., & Riley, J., Dissent.